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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Docket No. 1159

ALUMINUM COMPANY OF AMERICA, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal From the United States District Court for the Eastern District of Arkansas

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Pursuant to rule 16(3) of the Supreme Court Rules, appellants submit this brief in opposition to motions to affirm filed by the United States and the Interstate Commerce Commission, and the Arkansas Railroads, appellees in the above styled case. An extension of time for filing the Motion to Affirm was obtained by

the government until May 19th. However, the appellee railroads submitted their Motion to Affirm on April 19, and the Motion on behalf of the government was received by appellants on April 28. By agreement among the parties, this brief will be in opposition to both Motions.

GROUNDS FOR JURISDICTION

Since this is a direct appeal from a final judgment of a Three-Judge District Court involving the validity of an Interstate Commerce Commission decision, no question was raised concerning the jurisdiction of this Court on appeal. The basic contentions made by both Motions are that no substantial questions are raised which require plenary consideration by this Court.

THE QUESTION PRESENTED

The statement on behalf of the government, in its Motion to Affirm, brings the nature of the question which appellants seek reviewed into sharp focus. As the government pointed out (p. 5), appellants' sole attack concerns one commodity among many moving in intrastate commerce in the state of Arkansas. That commodity is fluxing stone.

It is correct that it is unnecessary for the Commission to support its decision, in a section 13 case, with a fully developed rate case on each and every commodity moving in intrastate commerce. The Commission's decision may rest upon the broad basis of general revenue discrimination. However, this is not what the Commission did. A major portion of the Commission's report dealt with the fluxing stone case (Jurisdictional Statement, 22A-30A). All of the contentions raised by appellants were rejected and the Commission con-

cluded that the Arkansas rates, including the fluxing stone rate, were unduly low, constituted an undue burden on interstate commerce, and unjustly discriminated against interstate commerce in violation of section 13(4) of the Interstate Commerce Act. (J.S. 41a) Immediately thereafter, (J.S. 42a) the Commission provided that its ultimate findings and conclusions are "without prejudice" to the right of a shipper to apply to the Commission for modification of any individual intrastate rate on the ground that such rate does not contravene the provisions of section 13.

But appellants had already stated their case to the Commission to except fluxing stone from any section 13 order which the Commission might enter. After devoting an extensive portion of its report to fluxing stone the Commission rejected appellants' contentions. It concluded that the intrastate rate on fluxing stone in Arkansas is a burden on interstate commerce and thus violated section 13(4). No other interpretation of the Commission's decision is possible. Consequently, the issues raised regarding fluxing stone were considered and passed on by the Commission and it is irrelevant whether the matter could have been decided on another basis. It is a fundamental rule of administrative law that an agency's decision must be upheld, if at all, on the same basis as stated in the decision. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169; *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 196.

Thus the Commission has specifically held that the Arkansas intrastate rate on fluxing stone is a burden on interstate commerce even though the Commission itself approved, for the same carrier in the same territory, a lower rate on fluxing stone applicable in inter-

state commerce. The question is whether the Commission exceeded its authority with respect to this part of its decision and whether the District Court erred in failing to set aside and annul the Commission's decision insofar as it was applicable to fluxing stone.

STATEMENT OF THE CASE

While the question presented has far reaching effects, the factual situation can be presented clearly and concisely. Separate commodity classifications are recognized by the railroad carriers and by the Interstate Commerce Commission for "crushed stone" and for "fluxing stone". Since fluxing stone is a basic raw material used in a great many manufacturing processes, fluxing stone rates are always maintained on a lower basis than crushed stone rates. In Arkansas there is a substantial intrastate movement of fluxing stone from Myersville, Arkansas to Bauxite, Arkansas for the aluminum industry. This rate was originally established as a maximum rate by the Arkansas Commerce Commission at $1.16 and subsequently raised by order of the Arkansas Commission to $1.38 which is its present level. There is no other fluxing stone rate for the aluminum industry in the United States.

In the neighboring state of Texas, also in Southwestern Territory, there are a number of intrastate rates on fluxing stone applicable to the Texas iron and steel industry. These rates are generally on a lower basis than the Arkansas fluxing stone rate for the aluminum industry and are participated in by the same railroad involved in the Arkansas movement of fluxing stone for the aluminum industry.

The only interstate rate in this territory on fluxing stone applies to the alkali industry for which the car-

rier is the Missouri Pacific Railroad, the same carrier involved in the Arkansas aluminum fluxing stone movement and one of the appellee railroads in this case. This stone moves from Prairie du Rocher, Illinois to Baton Rouge, Louisiana. The route of movement passes through the entire state of Arkansas and there is no dispute that this interstate rate is on a lower basis than the Arkansas rate.

One of the curious aspects of this case is the confusion which has arisen as to whether the commodities being transported in the Arkansas fluxing stone movement and the Prairie du Rocher movement are the same or are comparable. An illustration of this confusion is found at page 7 of the Government's motion. In footnote 7 the Government states that appellants argued to the Commission that the stone transported in the Prairie du Rocher movement was different from the stone transported for the Arkansas movement, whereas the railroads were contending that the two commodities were the same. The Government then states that the parties switched their positions on this vital factual question. This characterization of the contentions of the parties is entirely incorrect.

Throughout this proceeding, appellants have steadfastly maintained that there should be no distinction between the commodities transported in the Prairie du Rocher case and the Arkansas movement here involved. In both cases the commodity was fluxing stone and so recognized by the parties throughout all phases of the case. Indeed, one of Appellants' principal points is that the higher interstate rate on fluxing stone makes the finding that the Arkansas rate is unduly low completely invalid.

Furthermore, the railroads have never denied that the commodities involved in both movements were fluxing stone. Their principal contention is that the distinction between the Prairie du Rocher movement and the Arkansas movement is the presence of water competition in Prairie du Rocher which is not present in Arkansas. The Commission, however, rejected the validity of this distinction and pointed out that the language used in the two tariff descriptions was different.

Tariffs are designed so that ordinary laymen can determine what rate is applicable. They are written and published by many different persons and different language may be used to define the same product by different publishing agents in different places. In Arkansas the tariff description is—

> "Limestone, run of crusher, to be used only for fluxing purposes in the production of alumina"

In the Prairie du Rocher case the commodity description is—

> "Limestone crushed (not ground) run of crusher ranging in size from ¼ to 10 inches."

The use of the Prairie du Rocher stone was explained in the report of the Commission in *Limestone from Prairie du Rocher, Ill. to Baton Rouge, La.*, 276 I.C.C. 381, 382; 313 I.C.C. 71 as for the Solvay Process Division of Allied Chemical & Dye Corp. at its alkali plant in Baton Rouge. Appellees' rate witness agreed that it was fluxing stone, (R. 893, Tr. 22), and there is no doubt that the products in the compared movements are the same.

It is true that fluxing stone is limestone which has been crushed. It is also true that much of the com-

modity transported as "crushed stone" is also crushed limestone. But the Commission and railroads have recognized a classification difference, for rate making purposes, between fluxing stone and crushed stone, (J.S. 23a-24a), and it is common knowledge that fluxing stone rates are lower than the rates maintained for crushed stone (R. 884).

Thus the essential facts in this case are quite simple. The Commission has approved an interstate rate on fluxing stone which is lower than the level prescribed on fluxing stone in Arkansas by the Arkansas Commerce Commission. The Commission found the interstate rate compensatory. The interstate rate applied to fluxing stone for the alkali industry; the intrastate rate applies to fluxing stone for the aluminum industry. The rates were both multiple car rates; the volume of movement and other characteristics were remarkably similar (R. 597-98). Yet the Commission has held that failure to increase the higher intrastate rate constitutes a violation of section 13(4) on the grounds that it (the higher rate) is unduly low and is a burden on interstate commerce.

ARGUMENT

The statutory authority on which Interstate Commerce Commission must rely in asserting jurisdiction over the intrastate rate on fluxing stone is § 13(4) of the Interstate Commerce Act. (49 U.S.C.A. 13(4)). That section provides that the Commission may prescribe rates to be charged, or classifications or practices to be observed, if there is any undue, unreasonable or unjust discrimination against, or undue burden on, interstate commerce.

The majority of § 13 cases brought before the Interstate Commerce Commission since the Second World War have resulted from refusal of certain states to grant across the board rate increases on intrastate traffic which had previously been authorized on interstate traffic by the Interstate Commerce Commission. They are usually referred to as general revenue cases and involve rates on a great many commodities. Decisions rendered by this Court in *King* v. *United States,* 344 U.S. 254, *Public Service Commission* v. *United States,* 356 U.S. 421, and considered by this Court in *Mississippi Public Service Comm.* v. *United States,* 124 F. Supp. 809 (aff'd, 349 U.S. 908) and in *State Corp. Com. of Kansas* v. *United States,* 216 F. Supp. 376, (aff'd 375 U.S. 15), are all in the category of a general revenue case involving numerous commodities.

However that part of the Commission's decision which is here involved concerns its application to the commodity rate on fluxing stone and appellants challenge the validity of the Commission's order which requires this rate to be increased above the level prescribed by the Arkansas Commerce Commission as a maximum rate. To find an analogous situation it is necessary to study this Court's decision rendered in 1933 in the Florida log case, *Florida* v. *United States,* 292 U.S. 1, 78 L. Ed. 1077, 54 S. Ct. 603 (1933). The issue raised in that case was the validity of the Interstate Commerce Commission's order holding that the Florida intrastate rate on logs was unjustly discriminatory against interstate commerce. A previous decision of this Court had nullified the Commission's order because of insufficient findings (*Florida* v. *United States,* 282 U.S. 212, 74 L. Ed. 302, 51 S. Ct. 119). The Court

found that the Commission, in a new hearing, made the essential findings which were supported by substantial evidence and affirmed the Commission's conclusion that the intrastate rates were unduly burdensome against interstate commerce and thus in violation of § 13(4).

The Court pointed out that the Interstate Commerce Commission, in its decision entitled *Georgia Public Service Comm.* v. *Atlantic Coastline R. Co.*, 186 I.C.C. 157, compared the log rates in Florida with other log rates applicable in Southern Territory, both intrastate and interstate. At pages 160-163, the Commission showed that the Florida intrastate rates on logs prescribed by the Florida Commission were on a lower basis than the interstate rates maintained by the same carrier and lower than other intrastate rates in the same general territory. They found that transportation conditions in Florida were not such as to warrant a lower basis of rates on logs and further found that the transportation conditions in Florida were actually less favorable than on the Atlantic Coastline System (the carrier involved) outside of Florida. This Court (292 U.S. at p. 9) observed that the Commission had found the Florida rate scale was abnormally low in comparison with other interstate and intrastate rates and was less than reasonably compensatory.

Under such evidence presented to this Court in the Florida case, the Commission's order was undoubtedly justified. But the facts in this case are quite different. Here it is not disputed that the only rates on fluxing stone in Southwestern Territory are lower than the Arkansas fluxing stone rate. Furthermore, the Commission itself declared that the lower interstate rate (Prairie du Rocher to Baton Rouge) was compensa-

tory, *Limestone in Train Loads From Prairie du Rocher, Ill. to Baton Rouge, La.,* 313 I.C.C. at p. 86. Thus, the evidence here really indicates that the Arkansas rate is abnormally *high* when compared with other rates maintained on fluxing stone by appellee, Missouri Pacific Railroad. Furthermore, it is well established that one of the essential findings to support an order for revenue discrimination is that the intrastate rate is abnormally low, see *Mississippi Public Service Comm.* v. *United States,* 124 F. Supp. 809 at 813. Indeed, the Commission did make this finding but certainly it cannot be considered as supported by the evidence with respect to fluxing stone. Yet the Commission's finding applies to fluxing stone.

Appellants have established that the Arkansas fluxing stone rate here involved is not abnormally low. They have further shown that it is higher than a rate maintained by the same carrier in interstate commerce in the same territory which rate has been held by the Interstate Commerce Commission to be compensatory. As the Commission itself has recognized in *South Carolina Intrastate Freight Rates & Charges,* 300 I.C.C. 307, 309, there can be no burden on interstate commerce caused by an intrastate rate which is higher than a comparable interstate rate. The Commission sought to avoid the force of its own precedent by referring to the difference in language of the tariff discription. But both commodities are fluxing stone; both are so-called "multiple-car" volume rates, and both apply in the same general territory. If the Prairie du Rocher rate isn't comparable then there is nothing which is comparable. The crushed stone rates in Ar-

kansas are certainly not comparable because they apply to a different and higher-rated classification. The Commission must find the intrastate rate is unduly or abnormally low before it can assert jurisdiction. Since the rate attacked is higher than other fluxing stone rates in the Southwest, it is impossible to conclude that it (the higher rate) is unduly low and a burden on interstate commerce.

It is to be noted that there is no attack on the Arkansas Commission's classification of this stone even though the Interstate Commerce Commission, under section 13, could overturn the fluxing stone classification if it thought such classification was erroneous. The conclusion is thus inescapable—the Commission's decision, as applied to fluxing stone, exceeds its statutory authority and constitutes an unlawful invasion of the Arkansas Commission's authority to establish a maximum reasonable rate.

CONCLUSION

The Commission's decision in this case arose out of a general revenue proceeding involving the application of across-the-board increases in freight rates to intrastate commerce. The Commission however, in addition to determining the issue of revenue discrimination generally, also found revenue discrimination was caused by the level of the Arkansas fluxing stone rate. Since this rate is higher than other fluxing stone rates in the same territory, that part of the Commission's decision relating to fluxing stone is invalid. The District Court erred in not annulling the Commission's

decision relating to fluxing and setting aside the resulting rate increase with respect to that commodity.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

ALUMINUM CO. OF AMERICA ET AL. *v.*
UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 1159. Decided June 5, 1967.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE HARLAN took no part in the consideration or decision of this case.